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Supreme Court of the United States

OCTOBER TERM—1940

No. 342

CHARLES KIMMICH,
Petitioner,

against

NEW YORK CLEARING HOUSE ASSOCIATION, WILLIAM C. POTTER, PERCY H. JOHNSTON, FREDERICK V. GOESS, Receiver, HARRIMAN NATIONAL BANK & TRUST COMPANY,
Respondents.

BRIEF OF RESPONDENT, NEW YORK CLEARING HOUSE ASSOCIATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INZER B. WYATT, JR.
Counsel for Respondent New York Clearing House Association.

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Statement

Since the petition and petitioner's brief fail to set forth adequately the facts concerning this action, a brief statement by respondent seems essential.

Petitioner, who alleges that he was an unsecured depositor to the extent of $939.80 in the Harriman National Bank, has brought this action purportedly on behalf of himself and all other depositors similarly situated against the New York Clearing House Association, a New York unincorporated association, and two individual defendants, William C. Potter and Percy H. Johnston, to impose an alleged tort liability arising out of the failure of the Harriman National Bank. It may be noted that the entire principal amount of petitioner's deposit has been paid to him (Petition, p. 9). The complaint (Record, pp. 2-62) alleges the ground of liability to be that the New York

Clearing House Association represented that it would keep the Harriman National Bank open and then failed to do so, with resulting damage to the plaintiff. It is also sought to have the Receiver of the Harriman National Bank, Frederick V. Goess, joined as a party plaintiff, or, in the alternative, to have a co-Receiver appointed.

The various defendants named in the action moved to dismiss the complaint. New York Clearing House Association moved to dismiss on the ground of lack of jurisdiction over the subject matter and lack of jurisdiction over the person, or, in the alternative, to quash the return of service of summons upon it on the grounds of insufficiency of process and insufficiency of service of process (Record, p. 63). Respondents Percy H. Johnston and William C. Potter moved to dismiss on the ground of lack of jurisdiction over the subject matter (Record, pp. 66-67). The motion of respondent, New York Clearing House Association, to quash the service of summons was granted and the motions of William C. Potter and Percy H. Johnston to dismiss on the ground of lack of jurisdiction over the subject matter were also granted by the District Court in a decision rendered on August 5, 1939 (Record, pp. 68-72) and orders were entered thereon (Record, pp. 72-74). Plaintiff's motion for reargument was denied on November 24, 1939 (Record, p. 105).

Respondent, Frederick V. Goess, moved to dismiss the action as against him on the ground of lack of jurisdiction over the subject matter and on the further ground that the complaint failed to state a claim against him upon which relief could be granted. This motion was granted by the District Court on December 13, 1939 (Record, p. 107).

The plaintiff appealed to the Circuit Court of Appeals of the Second Circuit from the orders entered on the motions of the defendants. In a decision handed down on May 27, 1940 the Circuit Court of Appeals affirmed the judgment. The affirmance was on the ground that the complaint was properly dismissed for lack of jurisdiction; the court considered it unnecessary to discuss the appeal from the order quashing personal service upon the New York Clearing House Association. On June 12, 1940 the Circuit Court of Appeals denied plaintiff's petition for a rehearing and thereafter plaintiff made this present application for certiorari to this Court.

Jurisdiction and Statute Involved, and Opinion Below

Plaintiff relies upon Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 USCA 347 (a)) as the basis for the jurisdiction of this Court. The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 112 F. (2d) 135.

ARGUMENT

POINT I

There are no special or important reasons calling for the exercise of this Court's discretion to review the determination of the Circuit Court of Appeals that the District Court had no jurisdiction over this action.

It is hardly necessary to bring to this Court's attention petitioner's failure to comply with the Rules of this Court respecting the proper method of applying for a writ

of certiorari. Disregarding, however, the obviously improper form of the papers on which this application is made, it is clear that petitioner presents no special or important reasons to warrant a review by this Court of the decision of the Circuit Court of Appeals.

In petitioner's confused statement of "Reasons Relied upon for Allowance of the Writ" and in his brief, there are contained varied and curious theories of law which he deems applicable to this case. No useful purpose would be served by a detailed analysis of the contentions which he has advanced. It is sufficient to state that the arguments of the petitioner were sympathetically considered by the District Court on the motions by defendants and upon reargument. On appeal to the Circuit Court of Appeals that Court fairly considered the arguments of petitioner and wrote an opinion which effectively disposed of the claims which are again urged on this application for the writ of certiorari. Although the appeal from the order quashing personal service on the New York Clearing House Association was not discussed by the Court, its determination that the District Court had no jurisdiction made it unnecessary to consider that question.

Rather than present a detailed reply to petitioner's arguments on this application, in the interest of brevity, this Court is respectfully referred to the opinion of the Circuit Court of Appeals for the Second Circuit (reported: *Kimmich* v. *Potter, et al.,* 112 Fed. (2d) 135). From that opinion it seems plain that this case presents no special or important questions calling for the exercise of this Court's discretion to review.

POINT II

The petition should be denied.

Respectfully submitted,

INZER B. WYATT, JR.
Counsel for Respondent New York Clearing House Association.

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JOHN W. DAVIS,
EDWIN FOSTER BLAIR,
Counsel for Respondent,
William C. Potter.

Dated: September 12, 1940.

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Opinions of the Courts Below.

The three opinions of the United States District Court for the Southern District of New York are found at pages 68, 105 and 107 of the Record and, for the convenience of this Court, are printed as Appendix A to this brief.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 112 Fed. 2d. 135 (1940) and is found at page 112 of the Record.

Statement of Case.

In June, 1939, petitioner served a complaint upon respondent, William C. Potter, alleging that petitioner was an unsecured depositor in the Harriman National Bank & Trust Company in New York City to the extent of $939.80 and and that he was suing the above-named respondents to enforce an alleged tort liability arising out of the failure of the Harriman Bank in March, 1933. He claims to be suing on behalf of himself and all other depositors similarly situated.

Petitioner demands payment for the amount of his and other depositors' unsecured deposits with interest, less liquidation dividends. At page 15 of his brief below, petitioner admitted that all depositors of the Bank, including himself, have been paid "100 cents on the dollar" which, of necessity, reduces the claim herein merely to one for interest.

In substance, the claimed liability of the respondents is predicated upon their alleged misrepresentations and alleged fraud in failing to keep the Harriman Bank open, resulting in damage to the plaintiff. Petitioner also seeks to make respondent Frederick V. Goess, Receiver of the Harriman Bank, participate in the prosecution of this action, or, in the alternative, seeks the appointment of a co-receiver.

The lower Court (Hulbert, *D. J.*) dismissed the complaint as against respondents Potter and Johnston, two out of the six members of the Clearing House Committee. The ground for dismissal against respondent Potter was that the Court did not have jurisdiction over the subject matter of this action as diversity of citizenship and the requisite jurisdictional amount were lacking (R. 74). Petitioner's motion for leave to reargue the motion to dismiss the complaint was also denied by Judge Hulbert (R. 103). Judge Conger granted the Receiver's motion to dismiss as to him (R. 108). The Circuit Court of Appeals for the Second Circuit, in a unanimous opinion by Presiding Judge Learned Hand, affirmed the decisions of the District Court.

POINT I.

The complaint was properly dismissed because of lack of jurisdiction over the subject matter.

The complaint in the present case is wholly devoid of any "statement of the grounds upon which the court's jurisdiction

depends," thus failing to comply with the express requirement of Rule 8(a) (1) of the Federal Rules of Civil Procedure.

It is well settled that federal courts are presumed to be without jurisdiction unless grounds for jurisdiction are affirmatively shown by the pleading. *Butte & Superior Co.* v. *Clark-Montana Co.*, 249 U. S. 12 (1919); *Sound Marine & Machine Corp.* v. *Westchester County*, 15 F. Supp. 812 (U. S. D. C. S. D. N. Y. 1936); *Kellogg Co.* v. *National Biscuit Co.*, 4 F. Supp. 889 (U. S. D. C. S. D. N. Y. 1932). Because no grounds of jurisdiction are alleged or shown in the present case, the complaint is defective for this reason alone, and should be dismissed.

Furthermore, an analysis of the alleged cause of action, a tort suit by an individual bank depositor against a New York unincorporated association and the two individual respondents, shows that the only possible ground of federal jurisdiction in such an action is diversity of citizenship and the presence of the requisite jurisdictional amount of $3,000, 28 U. S. C. A. §41(1). Neither is here present.

A. Diversity of Citizenship.

It is well established that in order to predicate the jurisdiction of this Court on diversity of citizenship, there must be a complete diversity between the plaintiff and each of the defendants. *Levering & Garrigues Co.* v. *Morrin*, 61 F. (2d) 115 (C. C. A. 2nd, 1932), aff'd 289 U. S. 103 (1933); *New Jersey Central Railroad Co.* v. *Mills*, 113 U. S. 249 (1885).

In his complaint the petitioner states that he is a citizen of New York. He affirmatively alleges that the respondent, New York Clearing House Association, is a New York unincorporated association. The actual citizenship of each member of an unincorporated association is determinative of the jurisdictional requirements of diversity. *Levering & Garrigues Co.* v. *Morrin, supra; Thomas* v. *Board of Trustees of the Ohio State University*, 195 U. S. 207 (1904).

The complaint is devoid of any allegations of the citizenship of the various member banks of the respondent, New York Clearing House Association, many of which are New York corporations.

The complaint fails to make any allegations regarding the residence of respondent Potter or respondent Johnston.

B. Amount in Controversy.

The petitioner admittedly has been paid the face amount of his deposit, $939.80. Thus, his individual claim is reduced merely to interest on this deposit from March 14, 1933, a sum obviously much less than the requisite $3,000.

This action is brought by the petitioner individually, no other depositors having joined therein. In his complaint, the petitioner alleges that he is suing on behalf of all other depositors similarly situated, an evident attempt to have this action classified as a representative action so as to escape the jurisdictional amount requirement.

This action is clearly not a class or representative suit. The fact that there is a large number of persons having similar claims, or even claims exactly alike, is not enough to support a class or representative suit. It is well settled in this type of action that the claims of others cannot be availed of to make up the jurisdictional amount. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 589 (1939); *Scott* v. *Frazier*, 253 U. S. 243, 244 (1920); *Clay* v. *Field*, 138 U. S. 464, 479, 480 (1891). For a representative action to lie, there must be a class, having a common or general interest in a particular fund, the recovery of which for the benefit of all is the object of the suit, or, having a mutual interest in the protection of the same subject matter. Obviously, there is no common fund or interest in a tort suit for damages based on alleged deceit and misrepresentation because, by definition, each person who thinks himself aggrieved must allege and prove all ele-

ments of the tort, including reliance by him, as well as the damage which he has suffered as a consequence of the wrong. *Bouton* v. *Van Buren,* 229 N. Y. 17 (1920); *Cherry* v. *Howell,* 4 F. Supp. 597 (U. S. D. C. E. D. N. Y., 1931), aff'd on other grounds 66 F. (2d) 713 (C. C. A. 2nd, 1933); *Michelsen* v. *Penney,* 10 F. Supp. 537 (U. S. D. C. S. D. N. Y., 1934).

POINT II.

Petitioner's theories to sustain the jurisdiction of the Federal Courts are untenable.

Petitioner, a layman, has advanced several contentions to sustain the jurisdiction of the Federal Courts over this action, all of which are clearly erroneous.

First, he contends that the complaint alleges a violation of the federal banking laws (12 U. S. C. A. §93). This statute, by its very language, is directed against wrongs committed by directors of a national banking association. It is clearly inapplicable in this action as none of the respondents, admittedly, was a director or officer of the Harriman Bank.

Secondly, petitioner contends that he is asserting herein a derivative right of the Receiver of the Harriman Bank, a federal officer, relying on *Michelsen* v. *Penney, supra,* as authority to sustain federal jurisdiction. In this he has clearly misconceived both the theory and holding of the *Michelsen* case. The facts of that case which distinguish it from the case at bar are clearly shown in the opinion of Judge Hulbert (R. 105-106). The defendant in the *Michelsen* case was a director and the plaintiffs there sued, both in their own names and as assignees of a number of other depositors, whose names and addresses were set forth on an attached schedule and exceeded $3,000. Furthermore, the *Michelsen* case involved an action on behalf of the bank against one of its directors who allegedly committed wrongs against the bank, not against its depositors. The Court in

the *Michelsen* case specifically ruled that the directors' representations as to the solvency of the bank gave rise to a separate and distinct cause of action at law to each depositor of the bank and could not be made the subject of a derivative action (10 F. Supp. 537, 540). Furthermore, petitioner is not seeking to recover an asset of the Harriman Bank which the Receiver has failed to collect or to assert a claim of the Bank which the Receiver has refused to prosecute. Parenthetically, it should be noted that the Receiver in conjunction with the Comptroller of the Currency in an action brought in the State Courts of New York sought to enforce an alleged contractual obligation against certain members of the New York Clearing House Association and to hold respondents, Potter and Johnston, also liable in connection with the closing of the Harriman National Bank. Every judge in the three New York State Courts decided against the claims of the Comptroller and the Receiver. *O'Connor* v. *Bankers Trust Company,* 159 Misc. 920 (1936); aff'd w. o. opin. 253 App. Div. 714 (1st Dept. 1937); aff'd w. o. opin. 278 N. Y. 649 (1938).

Petitioner also seems to contend that as this action purports to involve a national bank and its Receiver, the Federal Courts have jurisdiction under Section 24(16) of the Judicial Code [28 U. S. C. A. §41 (16)]. No relief is demanded against the Receiver of the Harriman Bank. This action clearly is not one against a national bank within the meaning of the Statute.

The Circuit Court of Appeals specifically held that the cause of action sought to be alleged by the petitioner in any event could be available only to each of those depositors who could establish that he acted in reliance upon the fact that the Clearing House had not closed the bank prior to his deposit and that his deposit was made in reliance upon fraudulent misrepresentations.

As petitioner's alleged cause of action can be only a personal and individual one, the amount in controversy is far

less than $3,000. In addition there is wholly lacking any allegation showing diversity of citizenship.

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

JOHN W. DAVIS,
EDWIN FOSTER BLAIR,
Counsel for Respondent,
William C. Potter.

Dated: September 12, 1940.

APPENDIX A.

Opinion of Judge Hulbert dismissing the complaint as to respondents Potter and Johnston in the case of *Kimmich* v. *New York Clearing House Association, et al.*

"HULBERT, *D. J.*:

On August 30, 1932 the plaintiff opened a personal checking account with Harriman National Bank & Trust Company (hereinafter called the Bank) by an initial deposit of $750.83.

On March 4, 1933 the Governor of the State of New York declared a Bank Holiday, and on March 6, 1933 the President of the United States proclaimed a Bank Holiday, which was extended by further proclamation on March 9, 1933 and ratified by Congress on the latter date.

The Bank never reopened for regular business. On or about March 13, 1933 the Comptroller of the Currency of the United States appointed Henry E. Cooper as Conservator of the Bank and on or about October 16, 1933, appointed Frederick V. Goess, Receiver, in which capacity Mr. Goess is still acting.

On May 8, 1933 the balance to the credit of the plaintiff on the books of the Bank was $939.50 but his claim has been reduced by dividends declared and paid in liquidation to $196.25.

Plaintiff sues on behalf of himself and all other depositors similarly situated to enforce a claim of tort liability based upon the alleged misrepresentation and fraud of the defendants other than Goess the Receiver, whom he seeks to join

as a party plaintiff, or in the alternative, requests the appointment of a co-receiver.

The complaint is the product of a layman's draftmanship and for that reason the court has given special care in the consideration of its sufficiency (Rule 8 (f)) to determine whether it substantially complies with the requirements of subdivisions (a) and (e) of said Rule 8, Federal Rules of Civil Procedure.

Plaintiff is a citizen and resident of the State of New York.

The New York Clearing House Association is alleged to be an unincorporated voluntary association of banks,

> "with a constitution amended from time to time in an effort to give official and legal status to its acts and that the boards of Directors of member banks ratify such constitution in confirmation of such members' adherence to the rules, regulations and policies of the association, and that a committee consisting of five officers of member banks designated as the Clearing House Committee together with the President of the Association who acts as ex-officio member, has full charge of the affairs of the Association."

The complaint does not allege who the President or Treasurer of the Association is, nor the names of its member banks.

Rule 17 (b) Federal Rules of Civil Procedure, provides:

> "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined

by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

At common law an unincorporated association could not maintain an action in New York in its name, or be sued in its name and was required to sue and be sued in the names of all associates as parties plaintiff or defendant. *Saxer* v. *Democratic Co. Committee* (Erie County) 291 N. Y. S. 18. But, General Associations Law, (Chap. 915, Laws N. Y. 1920) Section 13, changed that and an action or a special proceeding may be maintained against the President or Treasurer of such an association and any partnership or other company of persons which has a President or Treasurer is deemed an association within the meaning of that section.

The return made by the Marshal discloses that service of the summons and complaint on the New York Clearing House Association was made by delivering to and leaving a copy, together with a copy of the bill of complaint, with E. L. Beck, as Manager of said association. The statute was not complied with. *Hagan* v. *Bricklayers' etc.*, 143 Misc. 591.

The motion made on behalf of the New York Clearing House Association to quash the service of the summons must be granted.

William C. Potter is Chairman of the Board of Directors of Guaranty Trust Company of New York, and Percy H. Johnston is the President of the Chemical Bank & Trust Company of New York, and each is a member of the Clearing House Committee of the New York Clearing House Association, but the complaint does not disclose citizenship and residence of either of them.

Plaintiff's prayer for relief

"demands judgment against the defendants for the sum of Nine Hundred Thirty-nine and 80/100 ($939.80) with interest thereon from March 14, 1933" (less the dividends heretofore paid in liquidation)

* * * * *

"all other unsecured depositors, demand judgment against the defendants for general damages in the full amount of their respective deposits with interest thereon from March 14, 1933" (less payments)

* * * * *

"and for such other general damages and such special damages as they may have suffered, with costs and disbursements, and the plaintiffs pray for judgment requiring the defendants to pay full damages upon such terms and conditions as to the court may seem proper."

The test as to when aggregation of claims will be permitted is stated in *Clay* v. *Field*, 138 U. S. 464, 479:

"* * * if several persons be joined in a suit * * * and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction."

In *Clark* v. *Paul Gray*, 83 L. Ed. 737, Mr. Justice Stone said at page 741:

"It is a familiar rule that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount to be within the jurisdiction of the District Court, and that those amounts cannot

be added together to satisfy the jurisdictional requirements."

Plaintiff contends, however, that a Federal question is involved which gives jurisdiction regardless of diversity of citizenship or the $3000 requirement. He asserts that in the administration of the duties of the Comptroller in the exercise of control and supervision over National Banks, the defendants are alleged to have "brought about a violation of Sections 55, 191 and 192 of Title 12, Chap. 2 of the Consolidated Laws of the United States" and that, moreover, since he has made the Receiver of the Bank a party, jurisdiction thereby is established. The plaintiff being a layman has wholly misconceived the scope of Sections 55, 191 and 192 of Title 12, Chap. 2 of the U. S. C. A. Motions granted as to the defendants Potter and Johnston. Settle orders.

Dated: N. Y. Aug. 5, 1939.

HULBERT,
U. S. D. J."

Opinion of Judge Hulbert denying plaintiff's motion for reargument in the case of *Kimmich* v. *New York Clearing House Association, et al.*

"HULBERT, *D. J.*:

Motion for reargument denied.

The plaintiff sues as an individual and the balance due him as a depositor is $196.25. While he states in the prayer for relief in his complaint that "all other unsecured depositors demand judgment against the defendants for general damages in the full amount of their respective deposits" less payments "and for such other general damages and such special damages as they may have suffered" the nature of the action is to be determined by the pleading and it clearly appears to sound in tort for "fraud, deception, conspiracy and other unlawful combinations."

Plaintiff places great reliance upon *Michelsen* v. *Penney*, 10 F. Supp. 537. In that case the defendant was a director; two of the plaintiffs were depositors and the third was president of a corporation depositor. They constituted a depositors committee and sued both in their own names and as assignees of a number of other depositors whose names and deposits were set forth on an attached schedule and exceeded $3,000; they also sued on behalf of all other depositors similarly situated. They alleged a demand upon the Comptroller of the Currency and the Receiver that suit be brought against defendant and refusal to sue. Such a factual situation does not exist here. Potter and Johnston are sued as individuals. The receiver is named as a defendant, as plaintiffs says, to give the court jurisdiction, but it does nothing of the kind. In a case so complicated upon the facts and the law it is unfortunate for the plaintiff that he is not a lawyer or represented by someone who is.

Dated: N. Y. Nov. 24, 1939.

HULBERT,
U. S. D. J."

Opinion of Judge Conger dismissing the complaint as to the defendant Receiver, Frederick V. Goess, in the case of *Kimmich* v. *New York Clearing House Association, et al.*

"CONGER, *D. J.*:

Motion of the defendant Frederick V. Goess, Receiver of the Harriman National Bank and Trust Co., to dismiss the action is granted as to him.

In arriving at this decision, I have followed the decision of Judge Hulbert in dismissing the action against the other defendants herein as well as his opinion denying the motion for a reargument.

As the case stands now, there are only two parties to the action, the plaintiff and the defendant.

Adopting the conclusions and principles laid down by Judge Hulbert in his decision dismissing the complaint as to the other defendants, I have come to the conclusion that (1) this court lacks jurisdiction, (2) that plaintiff has failed to state any claim against this defendant within the jurisdiction of this court and (3) that plaintiff has failed to state any claim upon which relief could be granted against this defendant.

Settle order on notice.

Dated: Dec. 13, 1939.

EDWARD CONGER,
U. S. D. J."